104

(1)

Supreme Court, U.S.
FILED

No. _____

08 - 141 AUG 4 - 2008

OFFICE OF THE CLERK

In The
Supreme Court of the United States

PHILIP F. GEORGE, JR.,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Mary Jane McFadden
Counsel of Record
MCFADDEN WINNER SAVAGE & SEGERMAN
175 South Third Street, Suite 350
Columbus, Ohio 43215
(614) 221-8868

Counsel for Petitioner

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

When government agents violate the Fourth Amendment's prohibition against general warrants by seizing Sixth-Amendment-protected communications between a defendant and his counsel that discuss the defendant's strategy, what is the appropriate remedy?

PARTIES TO THE PROCEEDING

There are no parties other than those named in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 13

I. Ohio's Courts Failed To Follow Relevant Decisions Of This Court Concerning The Sixth Amendment Right To Counsel 13

II. Ohio's Courts Ignored Relevant Decisions Of This Court Enforcing The Fourth Amendment's Prohibition Against General Warrants 17

III. Decisions of Federal Courts, And Courts In Other States, Conflict With Those Of Ohio's Courts On The Question Presented By This Petition.....18

CONCLUSION.....23

APPENDIX

Entry of
The Supreme Court of Ohio
Denying Jurisdiction to Hear the Case
and Dismissing Appeal
entered May 7, 2008.....1a

Judgment Entry of
The Court of Appeals for
The First Appellate District of Ohio,
Hamilton County, Ohio,
Affirming Decision of Trial Court
entered December 19, 2007.....2a

Judgment Entry of
Conviction and Sentence of
Hamilton County, Ohio,
Court of Common Pleas
entered March 1, 2006.....11a

Decision of
Hamilton County, Ohio,
Court of Common Pleas
Re: Motion to Dismiss Indictment
entered December 15, 2005.....13a

Memorandum Opinion of
The United States District Court for
The Northern District of Ohio
Eastern Division,
Ordering Return of Seized Property,
With Attachment,
entered June 28, 2004 .....29a

Attachment:

Attachment B
Items To Be Seized
undated.....42a

Opinion of
The Court of Appeals for
The First Appellate District of Ohio,
Hamilton County, Ohio,
Reversing First Conviction and
Remanding Case for Further Proceedings
entered June 4, 2004 .....49a

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Hicks,
480 U.S. 321, 107 S. Ct. 1149 (1987) 18

Barber v. Municipal Court,
24 Cal.3d 742, 598 P.2d 818,
157 Cal.Rptr. 658 (1979) 21

Graddick v. State,
408 So.2d 533 (Alabama, 1981) 21

Heck v. Humphrey,
512 U.S. 477, 114 S. Ct. 2364 (1994) 15

Maine v. Moulton,
474 U.S. 159, 106 S. Ct. 477 (1985) 15, 16

New Jersey v. Sugar,
84 N.J. 1, 417 A.2d 474 (1980) 21

Stanford v. Texas,
379 U.S. 476, 85 S. Ct. 506 (1965) 17, 18

State v. Cory,
62 Wash.2d 371, 382 P.2d 1019 (1963) 22

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052 (1984) 17

United States v. Cronic,
466 U.S. 648, 104 S. Ct. 2039 (1984) 17

United States v. Horn,
811 F. Supp. 739 (1992), *rev'd in part*,
29 F.3d 754 (1994) 19, 20

United States v. Levy,
577 F.2d 200 (1978) 18, 19, 20, 21

United States v. Marshank,
777 F. Supp. 1507 (N.D. Cal. 1991) 19, 20

United States v. Morrison,
449 U.S. 361, 101 S. Ct. 665 (1981) .....*passim*

United States v. Orman,
417 F. Supp. 1126 (D. Colorado, 1976) 19, 20

United States v. Peters,
468 F. Supp. 364 (S.D. Florida, 1979) 18

Weatherford v. Bursey,
429 U.S. 545, 97 S. Ct. 837 (1977) .....*passim*

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV .....*passim*

U.S. CONST. amend. VI .....*passim*

U.S. CONST. amend. XIV § 1 2

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 1983 13

Ohio Rev. Code § 1315.55(A)(1) 12

Ohio Rev. Code § 1315.55(A)(3) 12

RULES

FED. R. CRIM. P. 41(f)(1)(B) 5

FED. R. CRIM. P. 41(g) 5

OPINIONS BELOW

The Supreme Court of Ohio declined to hear this case without issuing an opinion. *State v. George*, Case No. 2008-0124, May 7, 2008, Case Announcements, 2008-Ohio-2028. App. 1a. The Court of Appeals for The First Appellate District of Ohio issued an unpublished judgment entry that articulated its grounds for affirming the trial court's decision. "Judgment Entry", *State v. George*, Case No. C-060293, First Appellate District of Ohio, Hamilton County, Ohio, December 19, 2007. App. 2a-10a. The trial court issued an unpublished, written decision finding that a Sixth Amendment violation had occurred, but overruled Petitioner's motion to dismiss the indictment. "Decision Re: Motion to Dismiss", Case No. B-01-07787, Court of Common Pleas of Hamilton County, Ohio, December 15, 2005. App. 13a-28a.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio declined jurisdiction on May 7, 2008. App. 1a. Jurisdiction to review this petition is conferred by 28 U.S.C. § 1257. This petition is being filed within ninety (90) days of the date of the decision of the Supreme Court of Ohio.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. amend. XIV, Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Philip F. George, Jr., was indicted in Hamilton County, Ohio (Cincinnati) on eleven gambling and gambling-related charges in October of 2001. The case was investigated by agents of the Ohio Department of Public Safety, a state-wide law enforcement agency. George resides in Summit County, Ohio (Akron), about 225 miles from Cincinnati. George retained Cincinnati-based counsel to represent him. George kept in his home letters that his lawyer mailed to him advising him about his case.

On February 10, 2002, post-indictment, Ohio Department of Public Safety agents executed a search warrant at George's home. The agent working with the Cincinnati-based prosecutor in the pending case was the affiant who obtained the warrant. That agent also participated in the search. When the search commenced, George was concerned that the searching officials would read and/or seize his communications with his counsel. He summoned an Akron lawyer to come to his home. Upon arriving, the lawyer learned that George was under indictment in Cincinnati. He reviewed the warrant to determine if it authorized the seizure of communications between George and his counsel. It did not. He objected to the agents seizing the

defense's communications. The agents seized them over his objections.

After the search, George's Akron lawyer contacted a special prosecutor whose name had been provided to him by the agents. That prosecutor arranged for a box containing defense communications to be returned. No explanation of who had reviewed the documents that had been returned, or whether any copies had been made, was provided. The defense filed a motion to dismiss the pending indictment. George kept the box of returned documents, with its contents intact, in his home, with the intention of using it as evidence when his motion to dismiss was heard.

In September of 2002, George was indicted by the State of Ohio in Lorain County, Ohio (Elyria), on gambling charges virtually identical to the charges pending in Hamilton County. The Ohio Department of Public Safety was the investigative agency in the Lorain County case. George retained additional counsel. George's lawyers exchanged memoranda discussing defense strategy in both cases based upon information provided to them, in confidence, by George. Copies of these memoranda were mailed to George's home where George kept them among his private papers.

The Hamilton County prosecutor did not file a response to the motion to dismiss. Instead, on December 20, 2002, shortly before the motion was scheduled to be heard, Ohio Department of Public Safety Agents, Lorain County sheriff deputies, and Internal Revenue Service agents entered George's

home, pursuant to a federal warrant, and took the evidence of what had been seized in the earlier search. They also seized all of George's subsequent communications with his counsel that discussed the defense's strategy. The same agent who was working with the Cincinnati-based prosecutor, and who had obtained the first search warrant, participated in the second search. He acted as one of two affiants in obtaining the federal warrant. (The other was an Internal Revenue Service agent.)

When the second search commenced, George summoned the same lawyer who had represented him at the first search. The lawyer reviewed the warrant. It did not list defense communications as things that could be seized. He again objected. This time, he was ordered from the premises and prevented from observing what the agents were doing. He returned with George before the search concluded, but the agents would not permit George, or his counsel, to inspect the items being seized to verify the search inventory as required by Fed. R. Crim. Pr. 41(f)(1)(B). The list of seized items on the search inventory form left by the agents was so cryptic that it could not be used to prove that the agents had taken defense communications.

After the agents left, George and his counsel could see that all of George's communications with his counsel concerning the pending indictments were gone. George filed a motion for return of property with the federal court that had issued the search warrant pursuant to Fed. R. Crim. Pr. 41(g). He also supplemented his motion to dismiss that had been filed after the first search in Hamilton County. He

moved for a continuance of the imminent hearing on that motion to allow time for the federal court to order the return of his hearing evidence. Although defense counsel introduced her file copy of one of the seized memoranda as evidence for the trial judge's in camera review, and the defendant testified that his copy of that memorandum was missing when the second search concluded, the trial court denied George's motion for a continuance, and his motion to dismiss.

George also filed a motion to dismiss the Lorain County, Ohio indictment. That motion remains unresolved pending the outcome of this appeal.

George was tried in February of 2003. He was convicted on eight counts and acquitted on three. He appealed on multiple grounds, including that the trial court had erred by denying his motion to dismiss because dismissal was the only effective remedy for the state's violations of his Fourth and Sixth Amendment privacy rights. In June of 2004, the Court of Appeals For The First Appellate District of Ohio, Hamilton County, Ohio, in a 2-1 decision, reversed George's conviction and remanded the case solely on grounds that the trial court erred by denying George's motion for a continuance of the hearing on his motion to dismiss. It did not reach the merits of George's dismissal motion because the actual papers that had been seized were not part of the record. Opinion, *State v. George*, Case No. C-030216, First Appellate District of Ohio, Hamilton County, Ohio, June 4, 2004, 2004-Ohio-2868, not reported in N.E.2d, App. 49a-73a; jurisdiction

denied, 103 Ohio St.3d 1525, 2004-Ohio-5852, 817 N.E.2d 408.

After the court of appeals reversed George's conviction, the federal court granted his motion for return of property. *In re: Matter of Searches of 326 Oak Crest, Copley Twp., OH and 316 Boyle Street, Akron, OH*, U.S. Dist. Ct., N.D. Ohio, E. Div., Case No. 5:02 MC 120, Memorandum Opinion, June 28, 2004. App. 29a-48a. Counsel agreed that the Office of the United States Attorney for the Northern District of Ohio could comply with the federal court's order by mailing the seized materials, via certified mail, directly to the Hamilton County trial court in Cincinnati.

A post-remand hearing on the motion to dismiss was held in December of 2005. The state did not establish a chain of custody for George's Sixth-Amendment-protected communications while they were in the government's possession. The state contended that, because the warrants authorized the seizure of some documents, and the agents were concerned about protecting George's rights, they had placed all "potentially privileged" documents into sealed containers for later review by a neutral prosecutor behind a "Chinese wall", and did not read them. The state presented no evidence that a "Chinese wall" was put in place after the first search. The written plan for the second search instructed the executing agents to seize items only if they were specifically listed in the warrant. It made no mention of the "Chinese wall" procedure described by the state at the hearing.

On direct examination by the prosecution, agents who participated in both searches denied reading the defense's communications, or discussing them with the prosecutor in George's case. When asked on cross-examination about details of what happened to the seized defense communications while they were in the government's possession, all of the agents who testified obfuscated or experienced failures of recollection. The agent who returned the box containing defense communications after the first search could not explain how they could have been segregated from the other documents that were seized without reading them.

The prosecutor in George's case testified that he had no contact with the seized defense communications and did not direct the agents to seize them. He claimed that he never discussed the searches with the agent with whom he was working, even after he was served with George's pleadings informing him of the illegal seizures. Having stated that he did not discuss the searches with the agent with whom he was working, he was forced to admit that he did not ask that agent about the sources of the information that the agent provided. Ultimately, he acknowledged that he could have used information derived from the illegally-seized defense communications without knowing its source.

A deputy sheriff, who served as the inventory officer at the second search, testified that all of the materials seized from the George home went directly to the Internal Revenue Service office in Akron. This testimony was given four years after the second search. It was contradicted by a chain-of-custody

receipt that the same deputy filled out and signed on the day of the search. That form shows that she surrendered everything listed on the search inventory to an Ohio official after the search concluded.

An Assistant United States Attorney comprised the government's "Chinese wall" after the second search. She admitted that she was not asked to serve as a "Chinese wall" until after George filed his motion for return of property. She also admitted that she had no personal knowledge of where the seized materials had been between the time of the second search and the time that they were surrendered to her several weeks later.

A box of seized materials forwarded by the Office of the United States Attorney for the Northern District of Ohio to the trial court was marked as an exhibit. Defense counsel requested that the trial court review its contents in camera. It contains George's copy of the strategy memorandum that defense counsel had offered as evidence of what had been seized prior to the first trial, and other sensitive defense communications. The agent working with the prosecutor could have used these documents prior to the first trial to learn details about the defense's strategy, and to anticipate cross-examination questions asked of him when he appeared as a witness.

Both search warrants were introduced as evidence. They did not list defense communications as "things to be seized". U.S. Const. amend. IV. The agents who executed the warrants testified that

they knew that George was under indictment at the time of both searches. One agent even admitted on cross-examination that he knew that no judge would permit the seizure of an indicted defendant's communications with his counsel.

The Akron lawyer that George called to the scene of both searches testified that he was willing and able, during both searches, to segregate George's Sixth-Amendment-protected materials into a box or other container, and transport them, in the company of an agent, for an in camera review by the judges who issued the warrants for a determination of whether they could be lawfully seized. But the agents executing the warrants would not discuss alternatives to outright seizure. They made no mention of a "Chinese wall" procedure during the searches. George's lawyer saw an agent reviewing letters on the letterhead of defense counsel during the first search. He observed that papers were scattered about and left behind in the George home after the second search, including a letter from a lawyer relating to a civil matter. This testimony belied the state's contention that its agents had sealed all "potentially privileged" documents for later review and did not read them.

George testified that, after the first search, he accepted his counsel's assurances that the courts would protect the privacy of his communications with them. But, after the second search, he did not, and chose instead to minimize what he told his counsel. He testified that the assurances provided by the government at the hearing did nothing to reassure him. He had seen an agent reading his

communications with his counsel when the searches were being conducted. The same agent testified under oath at the hearing that he had not done so. George chose to believe his eyes and not his adversaries.

George's trial counsel stated, on the record, that she could not represent her client effectively at any re-trial because of George's reluctance to confide in her.

The trial court decided that George's Sixth Amendment right to counsel had been violated. But it denied George's motion to dismiss, finding that a re-trial was the appropriate remedy. It then found that the court of appeals had already granted that remedy by reversing George's conviction, even if it did not realize what it was doing when it rendered its earlier decision. App. 13a-28a. Even though defense counsel had read the Fourth Amendment verbatim in open court as part of her argument, the trial court found that "neither prosecution or [sic] defense, objects to the seizure of the items in question". App. 14a. The trial court failed to mention that the primary reason that Sixth Amendment privacy exists is to encourage defendants to communicate with defense counsel. It focused exclusively on George's inability to prove affirmatively that the state had used the illegally-seized defense communications to help its case.

George was tried again. He did not testify. His counsel could not prepare him to testify, or provide informed advice as to whether he should testify. To do so, she needed information from

George concerning what he would say if he testified. He was not communicating that information to her. (George did not testify at the first trial either.)

George was convicted of two counts of felony money laundering in violation of Ohio Revised Code §§ 1315.55(A)(1) and 1315.55(A)(3), sentenced to two one-year terms to run concurrently, and credited with 425 days of time served prior to the reversal of his first conviction. "Judgment Entry: Sentence: Incarceration", filed March 1, 2006. App. 11a-12a. George appealed on the same interrelated Fourth and Sixth Amendment grounds he had advocated to the trial court, that are advanced in this Petition, and that he has argued at every stage of this case, including in his motion made to the federal court for the return of his property after the second search. On appeal, the state did not contest the trial court's finding that George's Sixth Amendment right to counsel had been violated. It argued only that, because the prosecutor did not have contact with the illegally-seized defense communications, re-trial was the appropriate remedy.

On December 19, 2007, in a "Judgment Entry", authored by the judge who had dissented in his previous appeal, the intermediate Ohio appellate court affirmed the trial court's decision. App. 2a-10a.

George appealed to the Ohio Supreme Court. On May 7, 2008, that Court declined to exercise jurisdiction, without opinion. App. 1a.

REASONS FOR GRANTING THE WRIT

I. Ohio's Courts Failed To Follow Relevant Decisions Of This Court Concerning The Sixth Amendment Right To Counsel.

Both the trial court and the intermediate Ohio appellate court cited this Court's decision in *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837 (1977), as a basis for determining that a re-trial was the appropriate remedy for the state's undisputed Sixth Amendment violation. App. 2a-10a, at 4a, and App. 13a-28a, at 16a (mistakenly referred to by trial court as "Waterford"). *Weatherford* was a civil case, brought under 28 U.S.C. § 1983. An undercover government agent was sued for attending two meetings with a defendant and his counsel without revealing his true identity. This Court found that the agent did not violate the defendant's Sixth Amendment right to counsel. He was invited to the meetings, and legitimately believed that he could not decline the defense's invitations without compromising an ongoing investigation. This Court observed that defendants can "exclud[e] third parties from defense meetings . . . ." 429 U.S. 545, at 554, 97 S. Ct. 837, at 843. In contrast, George and his counsel were powerless to prevent the repeated, unconstitutional intrusions of the state into their private communications.

Ohio's intermediate appellate court cited this Court's decision in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665 (1981), in affirming the trial court's remedy of a re-trial. App. 2a-10a, at 8a. In *Morrison*, federal agents met with an indicted

defendant outside of the presence of her counsel. While expressly disapproving of their attempt to interfere with counsel's function, this Court found dismissal inappropriate because the agents were totally unsuccessful. Any prejudice to defense counsel's effectiveness was completely negated by the defendant's testimony in *Morrison* that her relationship with her counsel was not affected by the agents' conduct, and that she disclosed no information to the agents. In this case, the state's agents succeeded in impairing defense counsel's effectiveness and in obtaining information about George's defense strategy. The trial court's "remedy" of a re-trial did nothing to restore defense counsel's effectiveness. Neither did it assure that the state's case at re-trial would be free of constitutional taint. By stressing the "absen[ce of] demonstrable prejudice, or substantial threat thereof" in *Morrison*, this Court tried to make it clear that it was not requiring defendants affirmatively to prove trial prejudice when state agents successfully interfere with the right to counsel. 449 U.S. at 365, 101 S. Ct. at 668. Remedies for Sixth Amendment violations should "neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* Because no remedy short of dismissal can accomplish those ends in this case, dismissal is required.

Ohio's courts required George to prove that the state's agents had acquired knowledge of the contents of the illegally-seized defense communications, and that they used that knowledge to further the state's case, as a precondition to

dismissal. The only means available to George for proving the knowledge of the state's agents was to elicit admissions from them. George had no hope of proving what knowledge existed in the minds of his adversaries. The state's agents could falsely deny having knowledge of the contents of the illegally-seized defense communications without any fear of prosecution for perjury. Moreover, the agents in this case had a motive to convict George beyond that which normally exists in a criminal case. The illegally-seized communications were now available to George as evidence; George would be barred from suing the agents for their now provable Fourth and Sixth Amendment violations if he was convicted. *See*, *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). By requiring George to depend on the veracity of his adversaries to obtain the only effective remedy for the Sixth Amendment violations of those adversaries, Ohio's courts deprived George of his right to counsel.

After *Weatherford* and *Morrison*, *supra*, this Court decided *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477 (1985), a case where a government operative was directed to meet with an indicted defendant outside of the presence of his counsel to obtain incriminating statements. The operative succeeded in inducing the defendant to make damaging admissions. This Court sustained the lower court's order suppressing the wrongfully obtained statements, and reiterated what it thought its previous decisions had already made clear: that is, "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection

afforded by the right to counsel". 474 U.S. *at* 171, 106 S. Ct. at 484. This case represents a particularly egregious failure to meet that obligation, not just by the law enforcement agents investigating George, but by the prosecutor as well.

After George's motion to dismiss was filed after the first search, the prosecutor did nothing to ascertain whether the agent with whom he was working had been involved. Had he done so, the second seizure of defense communications might have been prevented. Even after he was served with George's pleadings, filed after the second search, which informed him that agents of the Ohio Department of Public Safety had, once again, illegally seized communications between the defendant and his counsel, the prosecutor made no effort to determine the sources of information being provided to him. Incredibly, his obvious effort to retain plausible deniability about reading the illegally-seized defense communications, while leaving the door wide open to learn about their content, was lauded by the trial court as "admirably segregate[ing] himself from any access to the privileged documents". App. 22a. The investigative agents, the prosecutor, and Ohio's courts, all failed to understand what this Court meant by the phrase "affirmative obligation". 474 U.S. at 171, 106 S. Ct. at 484.

Even guilty defendants who plea bargain and never consider going to trial are entitled to the informed advice of counsel. This Court does not impose a burden on defendants to prove trial prejudice when courts or law enforcement officials

successfully interfere with defense counsel's function or deny the right to counsel (as opposed to cases where ineffective assistance claims are predicated upon defense counsel's performance). "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [Citation omitted.] ... [Such] impairments ... are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984) (quotation based upon reasoning in companion case of *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984), and cases cited at n. 25 therein).

II. Ohio's Courts Ignored Relevant Decisions Of This Court Enforcing The Fourth Amendment's Prohibition Against General Warrants.

The criminal defendants in both *Weatherford* and *Morrison*, *supra*, were free to decide whether their communications with their lawyers would be disclosed to third parties. George was deprived not only of that freedom, but also of the Fourth Amendment's explicit protection against general warrants. In *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506 (1965), this Court directed the lower courts to enforce the terms of search warrants with "scrupulous exactitude" when law enforcement officials chill the exercise of another constitutional right by seizing items not listed in their warrant because of the "precise and clear" language of the Fourth Amendment. 379 U.S. at 485, 481, 85 S. Ct.

at 511, 509. Ohio's courts ignored not only *Stanford*, but also *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149 (1987), and all of George's evidence proving that the state's agents had deliberately violated the Fourth Amendment's prohibition against general warrants. By doing so, they confirmed George's belief that he enjoyed no zone of privacy where he could hold communications with his counsel free from state intrusion.

III. Decisions of Federal Courts, And Courts In Other States, Conflict With Those Of Ohio's Courts On The Question Presented By This Petition.

Other courts have considered the question presented by this petition. Those courts have all recognized the continuing nature of the damage caused when the government unlawfully intrudes on defense communications and successfully gains access to information about a defendant's strategy. They have all found dismissal the necessary remedy. In *United States v. Peters*, 468 F. Supp. 364 (S.D. Florida, 1979), FBI agents seized a tape-recorded telephone message without a warrant. The message contained advice from the defendant's counsel concerning possible strategies in the defendant's case. Although the agents in *Peters*, unlike the agents in this case, did not know that they were seizing a defense communication when they seized the tape, the court found dismissal to be "the only viable solution" relying upon the Third Circuit's decision in *United States v. Levy*, 577 F.2d 200 (1978). 468 F. Supp. at 366.

In *Levy*, law enforcement officials arranged for a government agent to be indicted. He shared an attorney with a co-defendant and, through him, the government learned of the defense's strategy. In dismissing the indictment, the court reasoned that, when the government deliberately breaches the privacy surrounding defense communications, and succeeds in gaining access to details of a defendant's strategy, that it so "disturb[s] the balance implicit in the adversary system" that dismissal is required. 577 F.2d at 209. The *Levy* court did not read this Court's decision in *Weatherford*, *supra*, as allowing it to weigh the amount of prejudice to the defendant caused by the government's violation of defense privacy against the government's interest in proceeding, as Ohio's courts did in this case. *Id.*

Other federal courts have deemed dismissal to be the appropriate remedy in cases where the government successfully intruded on defense communications concerning strategy and the government failed to prove that the damage to defense counsel's function could be contained by a lesser remedy. *See, United States v. Marshank*, 777 F. Supp. 1507, 1524 and 1529-30 (N.D. Cal. 1991) (court exercised supervisory powers to dismiss indictment when government collaborated with defendant's attorney to build case against defendant) and *United States v. Orman*, 417 F. Supp. 1126, 1131-1132 (D. Colorado, 1976) (court found "no alternative to dismissal" as remedy for violation of defendant's Sixth Amendment rights).

Ohio's courts relied upon *United States v. Horn*, 811 F. Supp. 739 (1992), in deciding that

dismissal was not required. App. 2a-10a, at 7a, and 13a-28a, at 25a-27a. *Horn* did not involve governmental intrusion into communications between a defendant and his counsel. In *Horn*, a prosecutor gained insight into defense counsel's trial strategy by surreptitiously arranging to review documents that defense counsel selected for copying from among thousands of seized documents stored in a government warehouse. The court in *Horn* described the facts before it as "very serious", but not "outrageous" like the facts in *Levy*, *Marshank and Orman*, cases which it expressly distinguished. 811 F. Supp. at 751. The trial court in this case inaccurately cited *Horn* for the proposition that it could deny a motion to dismiss for a proven Sixth Amendment violation merely by announcing that it did not deem the Sixth Amendment violation to be "outrageous". App. 13a-28a, at 27a. But the *Horn* court, consistent with this Court's decision in *Morrison*, *supra*, found that it could tailor remedies, short of dismissal, that affirmatively assured the defendant "the effective assistance of counsel and a fair trial". 811 F. Supp. at 752. It did not impose a burden on the defendant to prove what the government had done with the information that it had unlawfully obtained before granting an effective remedy, or ignore defense counsel's function.[1]

---

[1] On appeal, the First Circuit reversed only one of the trial court's multiple remedies, the award of attorney's fees against the United States. Even though it found that the government had committed "egregious acts of prosecutorial misconduct", the First Circuit found that the trial court lacked jurisdiction to award attorney's fees against the United States because of the doctrine of sovereign immunity. *United States v. Horn*, 29 F.3d 754, 770 (1994).

The years of trouble and expense that George has incurred in his effort to enforce his right to counsel will cause other defendants to conclude that it is less expensive not to confide in counsel than to try to establish a right to do so privately. If this Court does not speak firmly on the question presented by this petition, Ohio defendants will have to decide between 1) confiding in their lawyers and risking assisting the state's case, and 2) not confiding in their lawyers and risking a lack of informed legal advice. Why should they have to make this choice?

The Court of Appeals of Alabama, in a case involving governmental eavesdropping on defense communications, observed that "[t]here exists a paucity of judicial treatment [concerning the remedy for] this particular type of Sixth Amendment violation". It dismissed an indictment, applying this Court's reasoning in *Weatherford*, *supra*, differently than Ohio's courts. *Graddick v. State*, 408 So.2d 533, 546 (Alabama, 1981).

The Supreme Court of California, in a case with a fact pattern similar to *Levy*, *supra*, dismissed an indictment. It noted that the defendants' reluctance to cooperate fully with their attorney was an important fact distinguishing the case before it from this Court's decision in *Weatherford*. *Barber v. Municipal Court*, 24 Cal.3d 742, 755, 598 P.2d 818, 825, 157 Cal.Rptr. 658, 665 (1979). *See also*, *New Jersey v. Sugar*, 84 N.J. 1, 21-22, 417 A.2d 474, 484-485 (1980) (New Jersey Supreme Court declined to dismiss indictment, but only because the evidence showed that the defendant's ability to work in

confidence with his attorney had not been impaired, and no defense strategy was contained in the statements obtained by the state.)

In *State v. Cory*, 62 Wash.2d 371, 377, 382 P.2d 1019, 1022 (1963), the Supreme Court of the State of Washington found that there was "no way to isolate the prejudice" to the defendant's right to counsel caused by the state's eavesdropping activity. It dismissed the indictment, even though the defendant had only requested that his conviction be reversed, observing that

> [i]f the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy.

62 Wash.2d at 377, 382 P.2d at 1023. This case illustrates the prescience of that statement. When the trial court failed to act promptly on George's motion to dismiss filed after the first illegal seizure, Ohio's agents did not even wait until the next case to repeat their unconstitutional conduct.

CONCLUSION

In most criminal cases, and almost always in cases where a court appoints counsel, defense lawyers meet their clients for the first time after charges are filed. Persuading a complete stranger to confide sensitive information is one of the most difficult tasks faced by defense counsel. Defendants will not confide in their counsel if the state can illegally seize defense communications without risking dismissal. Defense counsel must have the ability to assure their clients that the courts will protect the privacy of their confidences. If this Court does not reverse the decision of Ohio's courts, future defendants will not receive informed legal advice, and decisions will be made by courts and juries without the benefit of important information that can only be communicated to them through counsel.

This Court's answer to the important constitutional question presented by this petition is especially needed in Ohio. Philip F. George, Jr. respectfully requests that this Court grant a writ of certiorari and hear this case.

Respectfully submitted,

/s/ Mary Jane McFadden
MARY JANE MCFADDEN
McFadden Winner Savage & Segerman
175 South Third Street, Suite 350
Columbus, Ohio 43215-5188
614.221.8868

Counsel of Record for Petitioner